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IN THE

Supreme Court of the United States

October Term [redacted] 1970

No. 556

FILIPPO SACCO, also known as JOHN ROSSELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice Warren E. Burger and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Pilippo Sacco, also known as John Rosselli, and petitions this Honorable Court for a writ of certiorari directed to the Court of Appeals for the Ninth Circuit to review and reverse a decision of that Court affirming convictions of the petitioner for failure to register as an alien in violation of Title 8 U.S.C. §1302 and failure to notify the Attorney General of his current address in violation of §1306(a) of the Immigration Code. Petitioner maintains that he is a derivative American Citizen, and as such is not required to register or notify the Attorney General of his current ad-

dress a hearing is vital to determine the rights and duties of derivative American citizens, and the application of Title 8, Sec. 1451(c) U.S.Code to this case.

Jurisdiction.

Jurisdiction is conferred by Title 28, §1254(1).

The Court of Appeals rendered its decision on June 17, 1970. Thereafter, and within the time allowed by law, the appellant duly filed a petition for rehearing and said petition for rehearing was denied on July 21, 1970.

This petition for certiorari is being brought within 30 days following the denial of the petition for rehearing and within the time allowed by law.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is set forth in Appendix A and incorporated herein reference.

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved and the pertinent portions of the Immigration Code are set forth in Appendix B and incorporated herein by reference. The marriage certificate of Petitioner's mother and his naturalized stepfather as Exhibit C of Appendix.

The Facts.

Petitioner, born Filippo Sacco, who later took the name of John Rosselli, was brought to the United States from Naples, Italy, by his mother, Maria De Pasquale Sacco, on or about September 16, 1911. Maria, his mother, together with petitioner, lawfully entered the United States at New York in 1911. Filippo Sacco was born in Esperia, Italy, on July 4, 1905.

On October 13, 1918, in Somnierville, Massachusetts, Vincenzo Sacco, the father, died. Maria, the mother, was a widow. [R. T. 208-209.]

"On February 8, 1922 Maria married Liberato Cianciulli in Boston, Massachusetts. Cianciulli had been naturalized as an American citizen in Boston on September 20, 1909. [R. T. 242.] Under the Nationality Act of 1855 (not repealed until September, 1922), Mrs. Cianciulli now became an American citizen and by operation of law her children became derivative American citizens. Petitioner was then 16 years old. Neither the naturalization nor the marital status of Liberato Cianciulli or Mrs. Sacco has ever been attacked in a direct proceeding in which they were parties or given the 60 days notice and a hearing in the only manner in which the law authorizes such an attack." (Immigration Reg. 385.1; Title 8, Sec. 1451(e) U.S.C.)

Petitioner registered for Selective Service, and served in the Armed Forces of the United States.

He later served a term in prison. He also has had several minor brushes with the law. However, the derivative citizenship of Filippo Sacco, or John Rosselli, has never been attacked prior to this proceeding nor is it permitted, if jurisdiction exists at all, to be attacked in the manner here attempted by assuming that he was and is an "alien" and to attempt to prosecute him under this assumed plan for failure to register and for failure to report to the Attorney General of the United States. Since the Nationality Act of 1940 his derivative citizenship is beyond attack. Title 8, Sec. 1451(e) U.S.C.

The marriage of Mrs. Sacco to Liberato Cianciulli was testified to by William J. Kane [R. T. 533], Registrar of Births, Marriages and Deaths of the City of Boston. He testified the records went back as far as 1900 and that in the year 1927, entry No. 559 was a certificate of intention to marry dated January 30, 1927, and that the parties that intended to marry were Liberato Cianciulli and Maria Sacco. It was Liberato Cianciulli who signed the document which read:

> "Marriage, second, widow. White for color. Place of residence was 67 Everett Street, rear, Ward 2 in Boston. I believe that is East Boston. His age at that time was given as 58 years old. He was a storekeeper. His birthplace was Serino, Italy, the province of Avalleno. His father's name was Luigi Cianciulli, Italy, and Carolina DePiano, was his mother. Birthplace was Italy. That was it for the groom." [R. T. 537.]
>
> "The information on the bride was Maria A. Sacco. He listed her as widowed, second marriage. White, 43 Haynes Street, Ward 2, and that similarly would be in East Boston section, I believe. Age at the time of the intention was 38 years. Her occupation, at home. Her place of birth was Italy, San Pietro . . . And it was signed by Liberato." [R. T. 538.]

Thereafter, a marriage license [Ex. F] was filed. [R. T. 540.] The certificate reflects that those two persons were duly married. The actual marriage license was returned by the clergyman or justice of the peace to the Registry of the City, once the marriage has been performed on the basis of the intention, "and this is the certificate of marriage . . ." [R. T. 541.]

Exhibit F was admitted in evidence.

Russell H. Peck testified [R. T. 561] that he had a Naturalization Petition and Record, Volume 6, Nos. 1251 to 1500. That on September 20, or thereabouts, 1909, Liberato Cianciulli was granted a petition for naturalization. Mr. Cianciulli took the oath at that time. He identified a living spouse whose maiden name was Carmena, who was born in Italy and resides in Boston. [R. T. 653.] Carmena died on October 9-21, 1918. The place of residence at the time of death was listed as 37 Everett Street, East Boston, Massachusetts. It was listed that she was married and that her husband was Liberato Cianciulli. [R. T. 546; Ex. G.]

Richard J. Underwood, Chairman of the Board of Election Commissions in the City of Boston, testified that he had the voting record [R. T. 567, *et seq.*] and that Liberato Cianciulli registered that year to vote in Boston elections for Ward 2, Precinct 5 [R. T. 568] and that he gave his address as Rear, 37 Everett Street, first floor, East Boston. Under Massachusetts law at that time, a naturalized citizen who was seeking to vote was required to produce and still is required today to produce his naturalization papers. [R. T. 569-570.]

One who receives his citizenship by the marriage of his mother to the naturalized father receives derivative citizenship by operation of law. (*United States v. Kellar*, 13 Fed. 82 (C.C.A. Ill. 1882).) Petitioner was thereafter in the same status as one born in the United States under the Fourteenth Amendment. He was not required to do anything. Neither Congress nor the Attorney General had any jurisdiction over him. *Trop v. Dulles*, 356 U.S. 86. *United States v. Zacca*, 351 U.S. 91. *Castello v. U.S.*, 356 U.S. 256. Title 8, Sec. 1451(e) U.S.C.

Government counsel was caught by surprise in the middle of the trial by proof of the defendant's derivative citizenship resulting from petitioner's stepfather's marriage to petitioner's mother in 1922. He therefore sought and was given time to file an attack upon the same and to investigate whether the mother was still living, when she died, and other matters relating to the marriage by which he sought and the trial judge allowed a collateral attack on the marriage. Congress has not authorized such an attack in derivative citizenship. Title 8, Sec. 1451(e).

To overcome the presumption of the validity of the marriage of Liberato and Maria in 1922 and the presumption of innocence, government counsel, over the strenuous objection of defense counsel, was permitted to introduce the purported death certificate of the then purported wife of Liberato, giving her date of death as 1929 in Italy. [Exs. 72 and 72-A; R. 893 *et seq.*] Its contents was conclusionary and without foundation as to its source or reliability of it. (*People v. Ryerson*, 305 N.Y.S. 2d 91 re requirement of factual basis for conclusion.

Defense counsel objected that the document doesn't show she was then defendant's wife if someone reported she is the wife of Liberato at the time she died.

The trial court admitted the document as an exception to the hearsay rule. *In re Estate of Shega*, 156 N.W. 2d 392 the court said conclusions in official documents are not admissible. 20 Wisc. 2d 592. *People v. Sealyn*, 439 P. 2d 321, 67 Cal. Rptr. 409.

The document contained no foundation as to the sources of the information and whether they were conclusions of the recorder who made up the report.

The court also allowed in evidence Exhibits 70 to 74-A from Italy [R. 892-894] which contained conclusions without the source.

The court also admitted in evidence Exhibit 78, being a statement taken by Boston F.B.I. agents Boland and Martinelli on April 30, 1968 in Boston from petitioner's 86 year old mother orally and prepared by the agents after they had talked to the mother in the absence of petitioner or his counsel or any attorney for about a half hour without making notes of the conversation [R. 916-939]. Objections to the statement and motions to strike were denied [R. 938]. The statement was admitted in its entirety [Ex. 78; R. 938].

The court had informed defense counsel that unless he permitted the taking of the deposition of defendant's mother in Boston the court would instruct the jury that it had a right to construe the refusal against petitioner [R. 946]. Thereafter a deposition was taken from petitioner's mother. She became too ill to complete it and efforts by defense counsel to introduce it as far as it went were denied [Ex. N; R. 938]. Defense counsel offered to continue taking the mother's deposition. This was denied and the mother's deposition refused admission.

Invidious Treatment.

Prior to the petitioner's arrest and accusation, in this case two agents of the F.B.I., (not the immigration service) H. F. Dodge and Wayne Hill, intercepted the petitioner as he was walking on Rodeo Drive in Beverly Hills, California. The undenied circumstances are set forth in the affidavit of Trial Attorney James

Cantillon, commencing at page 172 and continuing to page 177 of the record. In his affidavit Mr. Cantillon sets forth [R. T. 173]:

> "(a) In or about the month of May, 1966, H. F. Dodge and Wayne Hill, agents of the Federal Bureau of Investigation, intercepted defendant as he was walking along Rodeo Drive in Beverly Hills, California. Agent Dodge stated to defendant the name 'Filippo Sacco.' He stated that he had some papers that he wanted to show defendant. The defendant asked if they were legal documents that the agent was entitled to serve upon him and when the agent responded that they were not, the defendant stated in substance that he was not interested in talking to the agent or in accepting any documents from him and that if he had any information he wished to communicate to defendant or any inquiry he wished to make of the defendant he should contact defendant's attorney. (Agent Dodge well then knew that the law offices of Cantillon & Cantillon represented defendant.) At that point the agents were walking one on each side of defendant and Agent Dodge said something to the effect that he and Agent Hill were the only ones possessed of certain information concerning defendant and that they wanted to help defendant before the matter went any further. To this remark the defendant make no response and the agents departed."

Thereafter, the agents gave him 24 hours in which to decide, if he would work with them. They wanted his "help" in "cooperating" with the government in furnishing information "concerning certain individuals

and concerning certain operations in the State of Nevada." Agent Dodge stated that if the petitioner would agree to cooperate with the Federal Bureau of Investigation in that regard that he (the agent) would see that there were no problems concerning petitioner's citizenship.

The offer was rejected and this prosecution followed.

It was also later testified to by Agent Harold F. Dodge that he had been shadowing or keeping petitioner under observation for 12 years—since December, 1957. [R. T. 1278.]

Furthermore, government counsel, prior to the trial, admitted that the government had conducted electronic surveillance of the petitioner in various places where he lived, but the recordings and related information were denied to petitioner prior to trial and only examined "in camera" by the Judge afterwards. [R. T. 1282, *et seq.*]

Motions to produce the electronic surveillance prior to trial were denied. Petitioner contends that under Rule 16, Federal Rules of Criminal Procedure, he was and is entitled to all statements which he made or which were monitored by the Government.

Government's Theory.

The government's case proceeded on the theory that the petitioner, after he left home at the age of 16, had changed his name to John Rosselli and had various brushes with the law in which he had claimed American citizenship by birth and residence in the United States.

In the trial of the case the petitioner, after the government had painted him with a black brush, introduced evidence of the marriage, as set forth hereinbefore. This testimony apparently proved a surprise to the government, that now shifted its legal position and sought to attack collaterally the validity of the marriage of petitioner's mother to his stepfather, Petitioner's deceased stepfather and his mother were in effect tried in absentia, a matter that went back 47 years. The prosecutor then argued two things,—one was that petitioner's mother was not *legally* married to Liberato Cianciulli because it somehow appeared that the stepfather, Cianciulli, had a wife still living in Italy. Nobody had heard from her, not even her own children, for more than seven years or at all. The prosecutor maintained she had died in 1929 and had not obtained a divorce or annulment in her home city prior to 1929. There was no evidence introduced that she had not secured a divorce or annulment at some place or other than the place where she lived and where the records would be if they were to be found. She had been absent and unheard from for more than seven years. The burden under the law required this proof. The presumption is that she was dead. See Am. Jur., Marriage Sec. 148; 93 A.L.R. 345. See also *Estate of Harrington*, 140 Cal. 244. California permits an attack only during the lifetime of the parties and only by one of them. *Sterlen v. Sterlen*, 6 Cal. App. 420, 424, 92 Pac. 320.

Based on this document, which the government produced, the prosecutor argued that since a child was born to Cianciulli and petitioner's mother, prior to their marriage, the marriage, which he now admitted had occurred, was to give the child born in August,

1920, legitimacy and "for the sake of her future name, which is fine and commendable, but without any intention to live together." [R. T. 1132.] Also, he contended that the marriage was to be something nice for the girls but not with a genuine intent on the part of either party to live together as husband and wife: [R. T. 1133.] Thus the prosecutor sought, without proof to psychoanalyze the deceased father's intent 46 years after the marriage and many years after the father's death and unavailability at trial.

There was no proof that Cianciulli had gone to Italy, although he had obtained a passport to go to Italy to dispose of property, according to a statement on his application. No boat records of his departure, were produced.

The government then, at great expense, sent someone to Italy to get the purported document of the death of the first Mrs. Cianciulli to overcome the present presumption of the validity of Cianciulli marriage to Mrs. Sacco, and they further attempted to buttress their claim by taking a statement out of the presence of the petitioner from his mother, which the Court allowed to be introduced into evidence, stating that she had registered as an alien since 1940 [Ex. 58] when the Alien Registration Act first went into effect, forgetting, however, that the government had announced at that time that if any person had any doubt of their status they should register. It does not appear that she had any legal advice on her need to register.

With two parties dead, the case was then tried on alleged facts, or lack of facts, existing in 1922, a period of 46 years prior to the date of the trial; through the month of May of 1968, the trial centered on the

validity of the marriage of two parties not present at the trial 46 years before. The defendant was the innocent victim of the trial in absentia of his parent and stepfather now deceased.

In instructing the jury, the Judge followed the Deputy United States Attorney's position that there was evidence before it on the basis of which it could find that the presumption of validity which attaches to a marriage has been overcome on either of two theories. First, it asked the Court to instruct the jury that it should conclude that the defendant was *not a citizen* if it found that Cianciulli had a wife living at the time of his marriage to Maria Sacco and it made no difference whether or not Maria Sacco was ignorant of the impediment, that the marriage was void and not merely voidable in Massachusetts.

Second, the government asked the jury be instructed to conclude that the defendant was an alien if it found that Maria Sacco and Cianciulli had married solely for the collateral purpose of legitimizing their daughter and had no intention of assuming the relationship of husband and wife.

Petitioner's trial counsel objected to the instructions based on both theories but the trial Judge gave the instructions set out in the margins of the Circuit Court's opinion.[1]

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[1] "[The presumption of the validity of a marriage] continues in force until overcome by the evidence to the contrary as you have been advised previously in these instructions.
Under the law of Massachusetts a marriage ceremony is void if either party has a living spouse and a previous marriage has not been terminated by annulment or divorce.
In order to establish that the defendant is an alien, the burden is upon the Government to prove either one to two things concerning the marriage of Maria Sacco and Liberato Cianciulli:

The Court also erroneously admitted into evidence the hearsay document which government agents had prepared from an interview with petitioner's elderly mother. It was hearsay, secured without advice of counsel. It should have been excluded.

Petitioner, having some minor brushes with the law when he was a juvenile, left home and changed his name to John Rosselli, by which he has been known ever since. There never was proof that he committed the acts charged against him as a juvenile. They were later dismissed.

In 1939 he registered in Los Angeles for military service and entered the Army as a private.

The Court of Appeals admits that with a general verdict returned that it was prejudicial error and admits that objection was made in the trial court on this issue, but set out that it did not have to reverse the case because of the erroneous general verdict on alternative instructions given to the jury. The Court of

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1. That the marriage between Maria Sacco and Liberato Cianciulli was void in that at the time of the marriage ceremony between Liberato Cianciulli and Maria Sacco in Boston on February 8, 1922, as evidenced by Exhibit F, Liberato Cianciulli was married to another person and that such person's previous marriage had not been terminated by annulment or divorce, that the prior spouse was then living on that date; or

2. It is necessary for the Government to prove that the marriage ceremony between Liberato Cianciulli and Maria Sacco in Boston on February 8, 1922 was not entered into with the good faith intention to assume the relationship of husband and wife, but was entered into for a collateral purpose.

But if you find that the marriage was void as above stated, or was not entered into with such good faith and intentions, then you are instructed that neither Maria Sacco nor her minor child Filippo secured derivative citizenship but that both remained as aliens."

Appeals admitted it was error to have received only a general verdict as it cannot be told which theory the jury adopted in the alternate. Nevertheless, it attempted to excuse the matter and affirmed the judgment despite the rulings of this Court in *Batchelor v. Maryland*, 397 U.S. 564, and other cases on the point, holding that in such circumstances the verdicts and judgment must be reversed.

The Court of Appeals also justified affirming the judgment on the basis of the War Brides Marriage case in *Lutwak v. U.S.*, 344 U.S. 604, comparing the War Brides Act with the Act of 1855 which requires that the alien be married to the citizen.

The War Brides case was a "conspiracy" to contract spurious, phony marriages for the purpose of deceiving the immigration authorities and perpetrating a fraud on the United States, 344 U.S. 609. It was tried shortly after the defendants and their brides entered the United States, not 46 years later when many of the witnesses were dead. The War Brides were witnesses at trial. The court there said the validity of the marriages was not an issue and not material in that case. The War Brides case was a direct attack on phony marriages. This was a collateral attack on the marriages of the parents 46 years later.

Evidence of Wire Tap; Pretrial Denied.

The Court also denied the objections to having a pretrial hearing on the wiretapping and held that all existing evidence obtained by the government had been supplied to the Court, holding also that the original tapes had been routinely destroyed and that the defendant's suppression motion and his discovery motion were denied.

Invidious Treatment Upheld.

The Court of Appeals also upheld the invidious treatment of petitioner.

The case before the District Court was ultimately and principally a trial over the marriage 46 years before of the petitioner's mother to the naturalized citizen, Cianciulli, who thereby gave petitioner derivative citizenship. It was not an attack by a party to the marriage or heirs, but by an outside third party—the government. Nothing in the proceedings shows any effort by the government at any time during the lifetime of the parties involved or since to vacate or set aside the marriage in Massachusetts and nothing shows any proceedings to attack the citizenship of petitioner when he registered for the draft and when he served in the Armed Forces of the United States. [Govt. Ex. 8] or much later when he served a term of imprisonment. It was only after the government apparently was seeking to make the petitioner a secret informer and to get admissions regarding his own citizenship, if it could, and to use him as an informer on people of his own nationality, people that they might seek to get information about, that he was singled out for invidious treatment by the government and prosecuted in this case for "failing to register", and to give his address to the Attorney-General. We find no precedent.

Questions Presented.

1. Whether a defendant is denied a constitutional right of speedy trial guaranteed by the Sixth Amendment United States Constitution where the principal issue ultimately involved and tried in the case is whether his mother was legally married to a naturalized citizen,

his stepfather, and whether his derivative citizenship could be attacked 46 years later in a court 3000 miles away from the place of the marriage of the mother and the naturalized citizen stepfather, and after the decease of the stepfather and a former wife after stepfather.

1a. Whether the court has jurisdiction to try the issue in a charge of failure to register as an alien and failing to report his address to the Attorney-General.

2. Whether the petitioner was singled out for invidious treatment by the government and being prosecuted because he failed to become an informer and to collaborate with F.B.I. agents to give them information about "operations" in Las Vegas, with which they thought he might be familiar or could get information, was a violation of due process of law and equal protection of the laws guaranteed by the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the petitioner was entitled to a reversal where the trial judge gave instructions to the jury on two alternate theories, one of which was that his mother married his stepfather and the marriage was illegal because the stepfather had a wife living at the time of his marriage to the mother and it made no difference whether or not Maria Sacco was ignorant of the impediment or whether the marriage was void because if the jury found that Maria Sacco and Cianciulli had married (46 years before) for the collateral purpose of legitimizing their daughter and with no intention of assuming the relationship of husband and wife. The instruction given to the jury was a general one and it cannot be proved from the verdict which one of the

two theories the jury adopted. Under *Batchelor v. Maryland*, 397 U.S. 564, and other cases, this is a jury question and therefore should have been submitted to the jury with an instruction that they should find specifically which one of the theories they were to adopt.

4. Whether the trial court erroneously admitted a hearsay statement taken by FBI agents from petitioner's aged mother. [Ex. 78; R. 936-938].

4a. Whether the defendant was denied Sixth Amendment rights in the taking and admission of the 86 year old ill mother's statement in Boston in defendant's absence Exhibit 78 [R. 936, 937] and the refusal to admit the deposition, as far as taken [Ex. N], and to continue taking it [R. 938].

5. Whether the petitioner was denied due process of law and guaranteed by the Fifth Amendment United States Constitution and entitled to acquittal in view of the fact that the presumption of the validity of the marriage could not be attacked several years after the death of one of the parties to the marriage; in this case the stepfather, Cianciulli, had died long before the trial and was unavailable to the petitioner in any form whatsoever.

5a. Whether Congressional intent to preserve derivative citizenship is expressed in the Nationality Act of 1940 in its policy change in Section 338(c), even though a parent's or husband's citizenship had been revoked or cancelled *ab initio* and applies equally whether derivative citizenship comes by operation of law or by a certificate of derivative citizenship. See 8 U.S.C. 738(d); 8 U.S.C. 1451(e), 8 U.S.C. Sec. 906 (1942) and 8 U.S.C. 1101 note (1952).

6. Whether the petitioner was entitled to all of the statements which were recorded from him during the electronic surveillance, under Rule 16, prior to pretrial and prior to the trial of the case.

7. Whether the petitioner's requirement to register as an alien violated his right not to incriminate himself.

8. Whether the petitioner was entitled to judgments of acquittal on each of the counts set forth in the indictment.

9. Whether the government had standing to bring a prosecution to determine whether a person who has derived citizenship has lost the same in any manner other than allowed or permitted by Congress or whether even Congress can take away citizenship once established, without the citizen's consent.

10. Whether the petitioner's conviction violates the Fifth Amendment as was required to be reversed by the Supreme Court's decision in *Marchetti v. U.S.*, 390 U.S. 39, 19 L. Ed. 2d 889, *Grosso vs U.S.*, 390 U.S. 62, 19 L. Ed. 2d 906 and *Haynes v. U.S.*, 390 U.S. 85, 19 L. Ed. 2d 923. The registration requirements are in violation of due process of law guaranteed by the Fifth Amendment U.S. Constitution; *Griffin v. California*, 380 U.S. 609;14 L. Ed. 2d 106; *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653.

11. Petitioner offered but the Court rejected a proposed defense instruction that he had a right to rely on the presumption of the validity of his mother's marriage in 1922 to an American citizen. This was error, depriving the petitioner of one of his defenses.

12. Whether the trial court erred in refusing defense offered instructions on the law of "wilfulness".

13. Whether the trial court erred in refusing to admit showing that the Government has had defendant's fingerprints for 30 years and has known his residence for the last ten years [R. 941].

This case, calling for the court's supervisory power, involves use and abuse of due process and violation of fundamental constitutional rights in respect to citizenship. It is a case of an attempt to take away derivative citizenship after the death of and without the presence of the main parties to a marriage after 46 years.

REASONS FOR GRANTING THE WRIT.

Although much has been said and publicized about the right to speedy trial and its importance in the administration of criminal justice, this case probably presents the most outstanding example of length of time to engage in criminal prosecution, of the main issue raised in the case, to-wit: 46 years after the admitted marriage of petitioner's mother to petitioner's stepfather in a marriage in the manner authorized by law in Massachusetts and depending upon all of the facts and circumstances relating to it.

This Court, through its Chief Justice, has ably said that the trial that attempted to take place 8½ years after the occurrence is a denial of speedy trial guaranteed by the due process clause of the Fourteenth Amendment. (*Dickey v. Florida*, 398 U.S. 30. *See also Klopfer v. North Carolina*, 386 U.S. 25; *Leary v. U.S.*, 395 U.S. 6, 23 L. Ed. 2d 57.)

The right to a speedy trial is generally considered to be both a fundamental right of an accused and a sound policy of the administration of criminal law. (Sixth Amendment, U.S. Constitution; *Klopfer v. No. Carolina*, 386 U.S. 225, 18 L. Ed. 2d 621; *Dickey v. Florida*, 398 U.S. 30; *Duncan v. Louisiana*, 391 U.S. 146, 20 L. Ed. 2d 494; Chief Justice Burger's message to the American Bar Assn. on the State of the Judiciary; 5 Wharton's Criminal Law 1; 5 Stanford L. Rev. 95.)

Rule 48b, Federal Rules of Criminal Procedure, expresses the policy of the law in respect to unnecessary delay in presenting a charge to a grand jury or in filing an information against a defendant who has been held to answer in the District Court, or where there is un-

necessary delay in bringing a defendant to trial the court may dismiss the indictment, information or complaint. (*Parr v. U.S.*, 351 U.S. 513, 100 L. Ed. 1377; *Pollard v. U.S.*, 352 U.S. 354, 1 L. Ed. 2d 392.)

In the *Petition of Provoo*, 17 F.R.D. 183, the Court says:

> "The notes by the Advisory Committee on Rules to Subdivision (b) were terse. 'This rule is the restatement of the inherent power of the Court to dismiss a case for want of prosecution'. Ex parte Altman, 34 F. Supp. 106"

It is a matter of general knowledge that memories grow dim with the passage of time, witnesses disappear. With each day the accused becomes less able to make his defense. In this case the thrust of the issue was the marriage of the petitioner's mother to his stepfather and petitioner's acquisition of citizenship, never attacked before and not attacked here in the state where the marriage took place and not for 46 years after the acquisition of derivative citizenship.

Congress Forbids Attack on Derivative Citizenship in Title 8, Sec. 1451(e) After Nationality Act of 1940.

Congress has clearly indicated its policy in preserving and protecting deeivative citizenship, even where the parent lost the citizenship *ab initio*. Both in the Nationality Act of 1940 338(d) and in the Nationality Act of 1952 Sec. 407, 8 U.S.C. 1451(e) Congress provided that "The revocation and setting aside of the order admitting any person to citizenship and cancelling his certificate of naturalization under the provision of subsection a of Section 338 of the Nationality Act of 1940, shall not, where such action takes place after the ef-

fective date of this chapter, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or been available to a wife or minor child of the naturalized person had such naturalized not been revoked. . . ."

The fact that derivative citizenship was acquired by marriage rather than by a certificate of naturalization should not deprive petitioner of Congressional policy in relation to derivative citizenship.

Thus Congress prevented attacks on derivative citizenship which occurred prior to 1940 and 1942 and 1952 even though the parent or parents were guilty of fraud in obtaining their citizenship, from which derivative citizenship was derived was revoked *ab initio*.

In our case no attack was ever conducted against the parents, alive or dead. The attack was first made in this case upon the son 46 years later. Title 8 U.S.C. Sec. 1451(e) by analogy forbids it.

It is unfair trial to try the petitioner on the theory that the prosecution espoused 46 years later and this should require the dismissal of the charges. We so move for such dismissal.

It is unfair trial to place a defendant on trial on circumstances that occurred 46 years before. In the case of *Loughran v. Loughran*, 292 U.S. 216, 78 L. Ed. 1219, reh. den. 292 U.S. 615, 78 L. Ed. 1474, this Court held that a marriage may not be annulled after the death of either party. See also: *Hitchens v. Hitchens*, 47 F. Supp. 73.

In *Damron v. Damron*, 301 Ky. 636, 192 S.W. 2d 741, it was held that a marriage cannot be attacked by a third person after the death of one of the spouses.

In this case, of course, the government conceded that Cianciulli was deceased at the time of the trial and unavailable as a witness.

The effect of the proceedings and trial in this case was to take away the citizenship which petitioner received by operation of law. It would appear from the opinion of the Court of Appeals that the petitioner or his mother or stepfather had to do something by way of a certificate or some other action but this was no more necessary than the acquisition of citizenship at birth under the Fourteenth Amendment. The effect of the proceedings in this case was to do indirectly what could not be done directly, that is, to strip the petitioner of derivative citizenship which he acquired by the marriage.

Petitioner urges this Court to determine whether petitioner's derivative citizenship may be taken away in this manner, and whether Congressional intent to the contrary is expressed in the Nationality Act of 1940 338(d), 8 U.S.C.A. 1451.

See:

Trop v. Dulles, 356 U.S. 86, 2 L. Ed. 2d 650; Immigration and Naturalization Code, Title 8, U.S. Codes, and the rules and regulations pursuant thereto; *United States v. Zucca*, 351 U.S. 91, 100 L. Ed. 964.

These, in fact, are jurisdictional matters without which the government has no right to make these changes and to try this case. *United States v. Zucca*, 351 U.S. 91, 100 L. Ed. 964; *Costello v. U.S.*, 356 U.S. 256, 2 L. Ed. 2d 741; 8 USCA 1451(a), Naturalization Act; *Trop v. Dulles*, 356 U.S. 86, 92; 2 L. Ed. 2d 630, 637, 638.)

Respondent admits that petitioner's mother was married to a naturalized citizen February 8, 1922, under the law as it then existed (making her son a derivative citizen by operation of law). He now contends, without the mother or father being a party to the proceeding, that the marriage was invalid, that the citizenship acquired by operation of then existing law should now, in 1970, be held not derivative and valid.

What he seeks to do in the case before the Court actually is to "denaturalize" the petitioner on the claim that the mother's marriage to his stepfather was not a *valid* marriage but a "void" marriage, even though they had a child and the marriage was never annulled nor any proceeding ever taken by the parties to set aside the marriage. The derivative citizenship resulting from this marriage cannot be attacked or voided in this proceeding.

This can only be done by the filing of an affidavit showing good cause as a procedural prerequisite to maintaining denaturalization proceedings under Section 348 of the Immigration and Naturalization Act of 1952, 8 USCA §1451(a), and could only do it following such a proceeding in which a full hearing is held against the mother and the father while both are alive. But no such administrative proceedings were held and the presumption of validity is to the contrary. We contend that if an attack is to be made this proceeding is a jurisdictional prerequisite to any contention that the petitioner is an alien, or to "denaturalize" him by a collateral attack on the marriage of his mother to his stepfather, a naturalized American.

In *Trop v. Dulles*, 356 U.S. 86, 92, 2 L. Ed. 2d 630, 638, the United States Supreme Court said:

"And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed."

See also:

Costello v. U.S., 356 U.S. 256, 2 L. Ed. 2d 741.

Costello v. U.S., 365 U.S. 265, 5 L. Ed. 2d 571.

The citizenship of petitioner could only fall if the citizenship of his parents fell on a trial in which they were parties and were fully notified and had a hearing. *(In re Naturalization of Joseph Estevez as a Citizen of the United States*, 189 F. Supp. 705.

In *Trop v. Dulles*, 356 U.S. 86, 91, 2 L. Ed. 2d 630, 637, Chief Justice Warren said:

"In Perez v. Brownell (US) supra, I expressed the principles that I believe govern the constitutional status of United States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship. ...

* * *

"Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections seals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed."

The following facts appear clear and without contradiction:

1. That petitioner's true name is Filippo Sacco, admitted in trial. [Exs. 30, 31, 32.]

2. That his mother, Maria Sacco, married Liberato Cianciulli on February 8, 1922 in Boston, Massachusetts. [Exs. E, F.]

3. That Liberato Cianciulli was naturalized as an American September 20, 1909 [Ex. 1] and was an American citizen when he married petitioner's mother on February 8, 1922, thus giving her and her children derivative American citizenship.

4. That under §1994, Revised Statutes of the United States, enacted February 10, 1855, such marriage made the spouse an American citizen and her children derivative citizens by operation of law.

5. That a child was born to Maria and Liberato Cianciulli named Maria. [Ex. G.]

6. That at no time was the marriage of February 8, 1922, annulled or set aside. That the government does not contend it should be or can be in this trial.

7. That no proceedings have been undertaken anywhere in which petitioner's mother or stepfather were parties or served with any proceeding to set aside the actual American citizenship of petitioner's mother by marriage or the derivative citizenship of her son.

Implicit in the admissions of the government was that petitioner's mother was actually married to petitioner's naturalized stepfather, and that the marriage had never legally been set aside in any proceeding direct or collateral.

Congress has never attempted to enact a law stripping a derivative citizen of his citizenship. Nevertheless, the government has attempted it in this "registration" proceeding by a collateral attack. *Afroyim v. Rusk*, 387 U.S. 253, 18 L. Ed. 2d 757, rejects and denies this procedure.

See also: *Ashford v. Ashford*, 268 P. 2d 382, that the marriage relationship must be fully protected.

Alternate Issues: General Verdict Requires Reversal.

This Court held in *Batchelor v. Maryland*, 397 U.S. 564, that where a jury is instructed on several grounds on which the jury may have picked only one ground, the case must be reversed, the Court saying that "if any one of these clauses which the Supreme Court has held to be separable was invalid, it cannot be held upon this record that the defendant was not convicted under that clause."

See also: *Williams v. N. Carolina*, 317 U.S. 287; *Terminiello v. Chicago*, 337 U.S. 1; *Stromberg v. California*, 283 U.S. 359.

We believe that under the authority of these cases the Court of Appeals erred and the case must be reversed on the basis of improper submission of the case to the jury.

Petitioner was also denied fair trial guaranteed by the due process clause and equal protection of the laws under the Fifth Amendment to the Constitution of the United States. Under the Seventh Amendment the petitioner is entitled to the issues being decided by the jury. It was error for the Court not to remand the case. (*International Co. v. Nederle Amerik*, 393 U.S. 74.)

Petitioner Was Also Denied Equal Protection of the Laws in Connection With His Invidious Treatment.

From the undenied record in this case he was singled out for invidious treatment and under threat of prosecution unless he became an informer and was subsequently indicted. We respectfully submit that this conduct was a denial of the equal protection of the laws

guaranteed by the Fourteenth Amendment to the Constitution of the United States. (*N. Carolina v. Pierce*, 395 U.S. 711, 725, 23 L. Ed. 2d 656, 659.)

> "Due process of law then requires that vindictiveness against the defendant for having successfully attacked his first conviction must play no part in the sentence he receives after new trial."

Although there the Court was speaking of vindictiveness in another atmosphere, we think that the analogy of vindictiveness for not becoming a government informer and resulting in a prosecution was equally applicable.

The government was willing, by whatever name the petitioner was known or took, to accept this registration for Selective Service (military service) and to accept his military services and willingness to fight and die for the United States. Also, petitioner had served a term of imprisonment and the government had an opportunity at that time to investigate his citizenship and it was only when he refused to be an informer on people of his own nationality and to be a puppet for the F.B.I. that he became a target for this prosecution. Such conduct would be the basis for imprisonment in Russia or in Pekin or in East Berlin, but surely it should not stand the light of day in the United States of America. Due process of law and fair trial forbid such vindictive treatment in any form. (*N. Carolina v. Pierce*, 395 U.S. 711, 23 L. Ed. 2d 656.)

Lack of Criminal Intent.

The Court should also determine whether a person situated in the position of the petitioner, having known that his mother married his stepfather, a naturalized citizen, had a right to believe that he was a derivative

citizen and had no need to register as an alien and as such was not subject to the provisions of the subsequent laws regarding registration, and there is an entire absence of wilfulness or wrongful intent.

Petitioner's contention is that even a decree of denaturalization cannot affect his derivative citizenship. In support of this position urges this Court to follow the holdings in *In re Findan*, D.C., 4 F. Supp. 189, and *In re Bolter*, D.C., 66 F. Supp. 566, in its construction of §338(d) of the Nationality Act of 1940, 8 U.S.C. §738(d), as that section read in 1942. The *Findan* case held in no uncertain terms that derivative citizenship cannot be affected by a denaturalization decree based on presumptive fraud, and the *Bolter* case reached a similar conclusion on the basis of the language of §338(d), holding that it was merely declaratory of the law as it then existed and did not purport to change the law. The provisions of §338(d) (8 U.S.C.A. §1451 (e) as it read in 1953), which are of concern in the case now before me, read as follows:

> "The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 of the Nationality Act of 1940 shall not, *where such action takes place after the effective date of this chapter,* result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or been available to a wife or minor child of the naturalized person had such naturalization not been revoked: *Provided,* That this sub-

section shall not apply in any case in which the revocation and setting aside of the order was the result of actual fraud * * *" (Emphasis added.)

This congressional policy protecting earlier derivative citizenship in the Nationality Act of 1940 applies equally to derivative citizenship whether obtained by operation of law or by a certificate of the parent of naturalization which came under attack after its issuance. This gives equal justice under the laws.

Defendant's Home "Bugged".

Another reason why this writ should be granted is that petitioner asked pretrial hearing on certain information furnished by the government that it had electronically "bugged" the petitioner and his telephones for some period of time. The government resisted any hearing on the matter until after the trial. However, Rule 16, Federal Rules of Criminal Procedure, provides that in any criminal case the defendant will be entitled to order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant "(1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. . . . (3) recorded testimony of the defendant before a grand jury."

The government's reply was that it had taped the conversations of the petitioner but the tapes were "rou-

timely destroyed" and the issues were later presented to the Judge *in camera*. Both of these procedures violated the due process clause of the Fifth Amendment to the Constitution of the United States which holds that if the government has recorded the statements of the defendant, the defendant is entitled to see the entire statement and that if the government prevents the defendant from learning of the facts of a case by its destruction or otherwise so the defendant may not know what evidence may enable him to clear himself, that it is a violation of due process of law. (*Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215.)

But the government says there was nothing in the statements that in any way involved the petitioner's citizenship. That was for him to determine. We respectfully challenge the right of *in camera* inspection of documents that do not involve the safety and security of the Nation and relate only statements of the accused telephone conversation. Such procedure denies the defendant the public trial guaranteed by the Sixth Amendment to the Constitution of the United States.

Petitioner offered but the Court rejected a proposed defense instruction that he had a right to rely on the presumption of the validity of his mother's marriage in 1922. This was error, depriving the petitioner of one of his defenses.

We think that all of the issues in this case are highly important for this Court in its supervisory power in the administration of criminal justice, and because of the importance of the constitutional issues and immigration laws involved.

This Court should grant a hearing because of the importance of the issues involved in the administration

of immigration laws and criminal justice and hold that to try a major issue inherent in a criminal case 46 years after the events on which it is based makes it too old, and too stale and surely a denial of speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States.

We pray for certiorari, for reversal of the judgments and an order of dismissal of the indictment.

MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee; vs. Filippo Sacco aka John Rosselli, Defendant-Appellant. No. 24,219.

|June 17, 1970|

Appeal from the United States District Court for the Central District of California.

Before: BROWNING, DUNIWAY and HUFSTEDLER, Circuit Judges.

DUNIWAY, Circuit Judge:

A jury found the appellant guilty on all counts of a six-count indictment; he received a six-month sentence on the first count and a thirty-day sentence on each of the remaining counts, the latter to run concurrently with each other and with the first thirty days of the sentence on the first count. Count one charged failure to register as an alien in violation of 8 U.S.C. §§ 1302 and 1306(a); counts two through six charged five violations of 8 U.S.C. §§ 1305 and 1306(b), which require an alien annually to notify the Attorney General of his current address. We affirm. Viewing the evidence in the light most favorable to the government, we state the facts established at trial.

Between 1923 and 1940 the defendant, using the name John or Giovanni Rosselli, though with some variations in spelling, claimed several different dates and places of birth, all in the United States. Since 1940, the effective date of the sections of the United States

Code requiring registration of aliens, the defendant has consistently claimed that he was born in Chicago on June 4, 1905. An entry in the Chicago Register of Births, under the name of Giovanni Rosselli, supports his claim, but that entry was shown at trial to be a forgery. His earlier inconsistent claims were shown to be supported by similarly forged or false documents, or to be unsupported.

In fact, the defendant was born Filippo Sacco in Italy on July 4, 1905. He and his mother, Maria Sacco, entered this country as aliens in 1911 to join his father and her husband, Vincenzo Sacco, who had preceded them from Italy. The defendant attended school and lived in Boston until his arrests in 1922 and 1923 on federal narcotics and state grand larceny charges. He was never brought to trial on those charges because he jumped bail, changed his name to Rosselli, and fled to California. Both indictments were ultimately dismissed. The defendant's father, Vincenzo Sacco, remained an alien until his death in 1918; the defendant's mother registered as an alien in 1940, and filed annual alien reports until the time of trial. The defendant has never been formally naturalized, nor has he registered as an alien or filed annual alien reports for the years 1965-67.

After the trial started, and after the reception of much of the government's evidence, the defense announced its intention to rely on an entirely new source of citizenship, at least in the alternative. This was that even if the government was correct in its assertion that the defendant was Filippo Sacco (which defendant did not then but does now concede), he was still not an alien, because his mother had married a naturalized

United States citizen, Liberato Cianciulli, in 1922. The defense offered to stipulate to much of Filippo Sacco's life history, as well as to the marriage of Maria Sacco and Liberato Cianciulli in 1922. The defense later introduced marriage records of the City of Boston showing that such a marriage took place on February 8, 1922. At the time of the marriage, citizenship by "derivation" was conferred on the minor children of alien women who married United States citizens by an 1855 statute, the Act of February 10, 1855, 10 Stat. 604, § 1994 Rev. Stat. U.S., repealed by Act of September 22, 1922, 42 Stat. 1022.[1] See *United States v. Kellar*, C.C.A. Ill. 1882, 13 Fed. 82.

The government countered this new line of defense by attempting to show that the marriage of the defendant's mother had not conferred citizenship under the 1855 Act either on her, or by derivation from her, on the defendant as her minor child. Cianciulli had a wife living in Italy at the time of the marriage; they married in order to legitimate a daughter born out of wedlock in 1920 rather than with the intention of living together as man and wife; the couple, who had been living together out of wedlock, had separated well before the marriage and never lived together again. Shortly after the marriage, Cianciulli departed permanently for Italy, but Maria stayed here. Her 1940 alien registration stated that she had never had a married name other than Sacco. Thus she never claimed citizenship conferred by the marriage.

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[1]The Statute provided in part:

"That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."

1. *The effect of 8 U.S.C. § 1451(a) and (e).*

The defendant's chief line of argument is that once derivative citizenship has been acquired by virtue of a presumptively valid marriage, it may be removed only as provided by Congress in 8 U.S.C. § 1451(a) and (e). He says that to remove citizenship in a criminal trial by means of a collateral attack on the validity of the marriage of his mother is a denial of due process and beyond the power of Congress.[2]

The flaw in this argument is that to benefit from it the defendant must first establish that he is a citizen. At trial the issue finally joined was whether the Sacco-Cianciulli marriage had succeeded in conferring citizenship on Maria Sacco, and therefore on her minor son the defendant, in the first place. Section 1451 deals with proceedings brought "for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization. . . ." Read literally, it cannot apply here. There never was an order admitting either the defendant or his mother to citizenship; no certificate of naturalization was ever issued to either of them. If the defendant's mother became a citizen, it was by virtue of the marriage alone, and it was only if she was married to a citizen that the defendant could derive citizenship from her. The government sought to show that there had been no valid marriage; if it did so, then there was no citizenship conferred on anyone, and hence no "naturalization." We find nothing in section 1451

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[2] Defendant's constitutional arguments rely on *Afroyim v. Rusk*, 1967, 387 U.S. 253; *Costella v. United States*, 1958, 356 U.S. 256; *Trop v. Dulles*, 1958, 356 U.S. 86; *United States v. Zucca*, 1956, 351 U.S. 91.

or in the cited cases which prevents the government from attacking the validity of the marriage.

2. *The validity of the "marriage" of the defendant's mother.*

At trial, the government took the position that the jury had evidence before it on the basis of which it could conclude that the presumption of validity which attaches to a ceremonial marriage had been overcome on either of two theories. First, it asked the court to instruct the jury that it should conclude that the defendant was not a citizen if it found that Cianciulli had a wife living at the time of his marriage to Maria Sacco, and that it made no difference whether or not Maria Sacco was ignorant of the impediment; the marriage was "void" and not merely "voidable" in Massachusetts. Second, the government asked that the jury be instructed to conclude that the defendant was an alien if it found that Maria Sacco and Cianciulli had married solely for the collateral purpose of legitimating their daughter and with no intention of assuming the relationship of husband and wife.

The defendant's trial counsel objected to the instructions based on both theories, but the trial court gave the instruction set out in the margin.[3] The jury was in-

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[3] "[The presumption of the validity of a marriage] continues in force until overcome by the evidence to the contrary as you have been advised previously in these instructions.

Under the law of Massachusetts a marriage ceremony is void if either party has a living spouse and a previous marriage has not been terminated by annulment or divorce.

In order to establish that the defendant is an alien, the burden is upon the Government to prove either one of two things concerning the marriage of Maria Sacco and Liberato Cianciulli:

1. That the marriage between Maria Sacco and Liberato Cianciulli was void in that at the time of the marriage ceremony between Liberato Cianciulli and Maria Sacco in Bos-

(This footnote is continued on the next page)

structed in the alternative and may have arrived at its conclusion that the defendant was an alien by either of the two routes permitted by the instruction. There was a general verdict, so that an error in either alternative would normally require reversal. We cannot tell which ground the jury may have relied upon.

However, defendant's appellate counsel does not argue that the district court erred in allowing the jury to conclude that the defendant was an alien on the second ground. He does include in his list of issues on appeal: "Whether the court erred in instructions given and refused?" and sets out the instruction quoted above in full. But he then says:

> "This was prejudicial error, since the status of the mother's marriage could not be attacked in attacking the defendant's derivative citizenship other than in the manner provided by the Immigration Code, and this was not done."

The supplementary matter filed by him after oral argument on appeal relates only to the portion of the instruction dealing with the first ground—that the marriage was bigamous.

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ton on February 8, 1922, as evidenced by Exhibit F, Liberato Cianciulli was married to another person and that such person's previous marriage had not been terminated by annulment or divorce, that the prior spouse was then living on that date; or

2. It is necessary for the Government to prove that the marriage ceremony between Liberato Cianciulli and Maria Sacco in Boston on February 8, 1922 was not entered into with the good faith intention to assume the relationship of husband and wife, but was entered into for a collateral purpose.

But if you find that the marriage was void as above stated, or was not entered into with such good faith and intentions, then you are instructed that neither Maria Sacco nor her minor child Filippo secured derivative citizenship but that both remained as aliens."

Defendant's trial counsel did object to the instruction, originally on the ground that there was insufficient evidence before the jury on the question, and later as follows:

> "there is absolutely no evidence from which this jury could find, or there is no evidence whatsoever that these people married in bad faith within the meaning of those cases cited by counsel, to wit, that they married for the purpose of avoiding the immigration and naturalization laws."
>
> "The jury cannot speculate in the absence of evidence and the fact of the matter is they proved that Mrs. Sacco has been registered as an alien since 1940."

He also lodged an objection to the court's refusal to instruct that the purpose to legitimate an illegitimate child was a lawful and proper purpose for marriage. Because error in the instruction, as to either ground, would require reversal, we conclude that in the interest of justice, we should consider the propriety of both of the two grounds stated in the instruction as a basis for finding that defendant is an alien.

a. *Bigamous marriage.*

There is evidence in the record on the basis of which the jury could have found that on the date of the marriage in question, Cianciulli had another wife living, that his marriage to her had never been dissolved by divorce or annulled, and that his wife, Liberata, lived until 1929. Moreover, there is evidence that Cianciulli married again in 1931, although the "marriage" to defendant's mother had never been dissolved.

The general rule is that the validity of a marriage is determined by the law of the state where it took place.

See *Loughran v. Loughran,* 1934, 292 U.S. 216, 223; *Yarborough v. United States,* Ct.Cl., 1965, 341 F.2d 621. The Massachusetts General Laws, Chapter 207, Sections 4, 6, 8, provide in relevant part:

> "§4. "A marriage contracted while either party thereto has a former wife or husband living, except as provided in section six . . . shall be void."
>
> §6. "If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents."
>
> §8. "A marriage solemnized within the commonwealth which is prohibited by reason of consanguinity or affinity between the parties, or of either of them having a former wife or husband living, shall be void without a decree of divorce or other legal process."

See *Puzo v. Puzo*, 1961, 342 Mass. 775, 173 N.E. 2d 268. In *Hopkins v. Hopkins*, 1934, 287 Mass. 542, 192 N.E. 145, where the children of a bigamous union were seeking to inherit under an intestate statute from their father, the court said:

> "[The bigamous ceremony] was invalid and gave no color of legitimacy to the children born prior thereto." (192 N.E. at 148)

There, it was only the effect given by section 6 to the death of the first wife, 25 years later, that legitimated the children, although their mother and father have lived as husband and wife for all that time and until the mother's death one year after the first wife's death. Here the parties to the marriage never lived together after the marriage, much less after the death of Liberato's wife, Liberata, in 1929.

Numerous cases interpreting the words "wife," "widow" and "children" in various federal statutes conclude that bigamous marriages fail to confer those statuses. See *Lawson v. United States*, 2 Cir., 1951, 192 F.2d 479, *cert. denied*, 343 U.S. 904, and the cases cited there, 192 F.2d at 481 n.5; *Bell v. Tug Shrike*, 4 Cir., 1964, 332 F.2d 330, *cert. denied*, 379 U.S. 844.

We conclude that the first ground stated in the instruction is correct.

b. *Marriage ceremony entered into without any intention of parties to live together as husband and wife.*

The instruction refers to a marriage entered into for a collateral purpose, but does not state what that purpose may have been. The only such purpose sug-

gested by the record was to legitimate an illegitimate daughter of Cianciulli and defendant's mother. Nothing in the record suggests that the purpose was to confer citizenship on anyone, and the instruction does not mention such a purpose.

A Massachusetts court has held that a marriage entered into for a collateral purpose is not even voidable, much less void. See *Hanson v. Hanson*, 1934, 287 Mass. 154, 191 N.E. 673 (sole purpose of marriage was retention of employment position and salary increase). We find no Massachusetts case involving a marriage entered into only to legitimate a child, but a number of courts in other states have refused annulments sought by parties to such marriages, even where they had agreed in advance not to live together and to seek an annulment. See *Schibi v. Schibi*, 1949, 136 Conn. 196, 69 A.2d 831, 14 A.L.R.2d 620; *Erickson v. Erickson*, 1944, 48 N.Y.S. 2d 588; *Wagner v. Wagner*, 1947, 59 Pa. D. & C. 90; *Bove v. Pincotti*, 1942, 46 Pa. D. & C. 159; *Campbell v. Moore*, 1939, 189 S.C. 497, 1 S.E.2d 784. On the other hand, some courts have held such marriages voidable. See *Conley v. Conley*, 1943, 28 Ohio Ops. 289, 14 Ohio Supp. 22, which granted an annulment, noting that state law made the child legitimate despite the annulment and thus no purpose could be served by refusing it. No case has been brought to our attention holding such a marriage void. The general rule is that a voidable marriage is considered valid until it is annulled, and cannot be collaterally attacked, 35 Am.Jur. Marriage, §§ 57, 58, pp. 220-221. And there is no evidence that defendant's mother's marriage to Cianciulli was ever annulled. If that principle is applicable here,

then the second ground stated in the instruction is erroneous.

In *Lutwak v. United States*, 1953, 344 U.S. 604, the Supreme Court was called upon to construe the so-called War Brides Act, 59 Stat. 659, formerly 8 U.S.C. § 232. That Act provided that, notwithstanding certain laws, regulations, Executive orders, or Presidential proclamations, ". . . alien spouses . . . of United States citizens serving in, or having an honorable discharge certificate from the armed forces . . . during the Second World War shall, if otherwise admissible . . . be admitted to the United States. . . ." To be admitted under the Act, it was necessary that the alien be a "spouse," of, that is, married to, the appropriate citizen. In that respect, the War Brides Act is closely akin to the Act of 1855, which requires that the alien be "married" to a citizen.

In *Lutwak*, three persons were convicted of conspiring to defraud the United States by bringing about ceremonial marriages, in Paris, between honorably discharged veterans and aliens, and by then telling the immigration authorities that the alien was married to the serviceman or woman. It was "part of the plan that the marriages were to be in form only, solely for the purpose of enabling . . . [the aliens] to enter the United States. The parties to the marriages were not to live together as husband and wife, and thereafter would take whatever legal steps were necessary to sever the legal ties." (344 U.S. at 607). The plan was carried out, and three aliens thus obtained entry into the United States.

On appeal, it was argued that the marriages were valid under French law (there was no evidence to the

contrary) and that the court erred in instructing the jury.

> "that if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all." (344 U.S. at 610-611.)

The Court disposed of this contention as follows:

> "We do not believe that the validity of the marriages is material. No one is being prosecuted for an offense against the marital relation. We consider the marriage ceremony only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. In the circumstances of this case, the ceremonies were only a step in the fraudulent scheme and actions taken by the parties to the conspiracy. By directing in the War Brides Act that 'alien spouses' of citizen war veterans should be admitted into this country, Congress intended to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. Congress did not intend to provide aliens with an easy way of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship; that petitioners so believed is evidenced by their care in concealing from the immigration authorities that the ostensible husbands and wives were to separate immediately after their entry into this country and

were never to live together as husband and wife. The common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien *spouses*' in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations. Such was not the case here, or so the jury might reasonably have found. Thus, when one of the aliens stated that he was married, and omitted to explain the true nature of his marital relationship, his statement did, and was intended to carry with it implications of a state of facts which were not in fact true."

"Because the validity of the marriages is not material the cases involving so-called limited-purpose marriages [citing *Schibi v. Schibi, supra,* and *Hanson v. Hanson, supra*] cited by petitioners to support their contention that the marriages in the instant case are valid, are inapplicable. . . ." [344 U.S. at 611-12]

We hold that the foregoing principles are applicable here. We conclude that the effect of *Lutwak* is to add to the requirement that the marriage be valid where performed an additional, federal, requirement, that the parties must have intended that the marriage be one falling within the Court's definition of the common understanding of marriage.

It is true that in *Lutwak* the collateral purpose for going through the marriage ceremony was to take advantage of the War Brides Act, while in the present case the collateral purpose was to legitimate a child rather than to take advantage of the Act of 1855. But if, as the Court held in *Lutwak,* the Congress had

in mind "the common understanding of marriage" when it made provision for alien "spouses" in the War Brides Act, we think it must be equally true that it had in mind the same "common understanding of marriage" when it made provision for an alien woman "married" to a citizen of the United States in the Act of 1855. Indeed, if Congress did not intend to confer the boon of *entry* into the United States upon aliens who went through what the Court described in *Lutwak* as "spurious, phony marriages" (344 U.S. 609) and as "sham, phony, empty ceremony" (*id.* at 615), how much less likely is it that, by the Act of 1855, the Congress intended to confer the boon of citizenship upon a woman entering into such a marriage? It is also true that in *Lutwak* the Court did not have before it the question whether the aliens there involved were entitled to enter the United States under the War Brides Act, in spite of the fraud in which they had participated. But the *Lutwak* rationale makes it impossible for us to believe that the Court would have held that they did have a right to enter. See also *United States v. Rubinstein*, 2 Cir., 1945, 151 F.2d 915, 918-19, *cert. denied*, 326 U.S. 766. The jury instruction given by the trial judge in *Lutwak* is a quotation from Judge Learned Hand's opinion in *Rubinstein*.

We hold that it was not error to include the second ground in the instruction.

3. *Self-incrimination.*

Defendant argues that 8 U.S.C. §§ 1302, 1305, 1306 (a) and 1306(b) violate his right against self-incrimination. However, the alien registration statutes are "essentially non-criminal and regulatory" provisions, *Marchetti v. United States*, 1968, 390 U.S. 39, 57. Com-

pare *Shapiro v. United States*, 1948, 335 U.S. 1; *United States v. Sullivan*, 1927, 274 U.S. 259. See also *United States v. Toussie*, 2 Cir., 1969, 410 F.2d 1156, 1159-60, *rev'd on other grounds sub nom Toussie v. United States*, 1970, 397 U.S. 112, and the dissenting opinion of Mr. Justice White at 133-34; *Davidowitz v. Hines*, M.D.Pa., 1939, 30 F.Supp. 470, 475-76, *aff'd*, 1941, 310 U.S. 52, 73-74.

The defendant makes no effort to explain in what way complying with any of those statutes would have tended to incriminate him.

4. *Due process.*

The defendant further argues that the alien registration statutes are unconstitutional restrictions on the rights of aliens to travel within the United States. Again, he makes no effort to explain in what manner those sections restrict travel.

The defendant argues that he was denied due process and equal protection of the laws in that he was singled out and relentlessly investigated because of his suspected complicity in other, unrelated crimes. The conscious exercise of selectivity in enforcement is not in itself a constitutional violation where it is not further alleged that "the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." *Oyler v. Boyles*, 1962, 368 U.S. 448, 456. Here, selection of this defendant for intensive investigation was based on his suspected role in organized crime (in addition to the two charges in Boston, Rosselli had a long history of arrests followed by dismissals in California—ten between 1924 and 1932—and served three years and five months of a

ten-year sentence following a federal conviction of conspiracy to interfere with interstate trade and commerce by coercion, threats and violence in 1943). It cannot be said that that standard for selection is not rationally related to the purposes of the various criminal laws for violation of which Rosselli was being investigated, including the alien registration laws.

5. *Confrontation.*

The defendant argues that he was denied his Sixth Amendment right to confront the witnesses against him. The evidence to which he now objects was admitted under well-recognized exceptions to the hearsay rule. The use of certified public records to prove events, without producing the officials who recorded them, falls within such an exception. The defense did not object at trial to the admission of those documents, but merely requested a continuance to make an independent investigation in Italy, which was granted.

The signed statement of defendant's mother falls within another such well-recognized exception: declarations concerning family history. See Cal. Ev. Code §1310 (West 1966); *Ex Parte Delaney*, 72 F.Supp. 312, 323 (S.D.Cal. 1947), *aff'd sub nom. Carmichael v. Delaney*, 9 Cir., 1948, 170 F.2d 239. The witness was unavailable. The prosecution made a series of efforts, the last one during trial, to arrange for her presence at trial as a witness and to depose her. Her own doctor's medical excuses were accepted until the time of trial, when the trial judge ordered a medical examination after the prosecutor informed the judge of several instances of behavior inconsistent with her doctor's statements. It was determined that she was unfit to travel. The defense then arranged for a deposition

during trial on condition Mrs. Sacco's doctor could end the questioning whenever he thought her physical condition indicated it; he did, just as cross-examination was getting warm, and the trial judge refused to admit parts of her testimony.

6. *Willfulness and knowledge.*

The defendant asserts that "guilty knowledge" was an element of the crime and was not proved. The jury was instructed that under each count it must find willfulness:

> "With respect to the crime charged in each count of this indictment, . . . willfulness must be proved beyond a reasonable doubt, that is to say, specific intent must be proved before there is a conviction.
> "Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.
> "A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent."

There was sufficient evidence in the record to support the jury's verdict on this element of the offense.

7. *Prejudicial evidence.*

Defendant argues that the government evidence admitted to refute his various false claims to birth in this country constituted "a great mass of highly prejudicial evidence." He argues that his choice at trial to rely for citizenship exclusively on his mother's remarriage made that evidence "irrelevant and immaterial to the issues. . . ." However, it is sufficient answer to these conten-

tions that the falsity of those claims to native birth, and the fact that the defendant was actually born Filippo Sacco in Italy, were not formally conceded until final argument. Only as he was reading his instructions to the jury did the judge eliminate the instruction relevant to the issues of identity. The defendant's offer to stipulate to various facts about Filippo Sacco's early history did not extend to an offer to stipulate that the defendant was Filippo Sacco. Moreover, much of the evidence of which counsel now complains remained relevant to prove specific intent.

8. *Wire-tapping.*

Defendant's final contentions relate to a post-conviction hearing as to whether any of the government's evidence was tainted by admittedly trespassory surveillance, and whether the defense should have been allowed additional discovery beyond the materials supplied by the government.

After a hearing, the trial court found that all existing evidence obtained by the government had been supplied to the court and the defendant and that none of that information had been used, or had furnished leads to information that had been used, at trial. The court also found that the original tapes had been routinely destroyed. Both the defendant's suppression motion and his discovery motion were denied.

The defendant's objections to those rulings seem to fall into two groups. First, he suggests that the trial court relied on an *in camera* inspection of materials that were unavailable to the defense, and that this procedure denied him due process and equal protection of the laws. The government asserted that the copy of the material derived from illegal surveillance that the

government supplied to the defense was complete except for (1) the names of the persons who made the logs and (2) material not obtained from electronic surveillance that was "not in any way even remotely connected with this case." The trial judge did not say either in his order or at the hearing that he had fully verified that assertion through *in camera* inspection of the unexcised copy supplied him. We are invited to do so.

These trial court proceedings were consonant with the Supreme Court opinion in *Alderman v. United States*, 1969, 394 U.S. 165, 180-87. See also *Desist v. United States*, 1969, 394 U.S. 244, 246-47 n.5. The defendant's counsel were given an opportunity to examine the products of the surveillance for themselves in an adversary proceeding, and were unable to find any source of taint. See also *Taglianetti v. United States*, 1969, 394 U.S. 316, 317:

> "Nothing in *Alderman* . . . requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. . . . Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files."

The defendant's second objection concerns the timing of the hearing. Shortly before trial the defense was served with a "Memorandum Disclosing Electronic Surveillance" and representing both that the prosecutor had not had access to any of the information from the surveillance and that it had no "possible bearing on or relevance to" the defendant's prosecution. The government also represented that:

"1. Its case in trial will not rely upon tainted evidence or any clues or leads derived therefrom and the Government will be able amply to demonstrate this at a posttrial hearing.

2. A pretrial hearing is likely to be of considerable duration, and the need for it would be obviated if defendant is acquitted.

3. At a pretrial hearing only a hypothetical or tentative case could be presented, and all questions and answers given at the trial could not be fully anticipated. Nor would the court be able to ascertain the constitutional purity of the Government's potential cross-examination of defense witnesses and defendant Sacco himself.

4. A pretrial hearing would inevitably amount to an unrestricted discovery of the Government's case.

5. A pretrial hearing in this case would probably attract extensive publicity and may prejudice defendant's right to a fair trial."

The trial judge denied the defense motions for a pretrial hearing on suppression and discovery motions relating to the electronic surveillance. Both inquiries were postponed until after trial. Before the hearing took place, a hearing on electronic surveillance in the related Friars Club case was held, and evidentiary portions of that hearing were made part of the record in this case by stipulation.

Other district courts have granted motions to postpone suppression hearings until after trial. See, *e.g.*, *United States v. Birrell*, S.D.N.Y., 1967, 269 F.Supp. 716. Where there has been no hearing at all in the

trial court because the surveillance first came to the attention of the defense after trial, the Supreme Court has repeatedly indicated that a post-trial hearing is the proper remedy. See *Desist v. United States, supra,* 394 U.S. at 246-47 n.5; *Kolod v. United States,* 390 U.S. 136, *modified on rehearing sub nom. Alderman v. United States, supra,* 394 U.S. at 165; *Hoffa v. United States,* 1967, 387 U.S. 231, 233-34. We hold that the decision of the trial judge as to the timing of the hearings was within his discretion, and not an abuse of it.

The defendant's counsel does not claim error in the denial of his post-trial discovery motion. Nor does he object to the district court's rulings on the scope of his cross-examination of the F.B.I. agent who was in charge of the "Rosselli file." We find no error.

Affirmed.

APPENDIX B.

Constitutional and Statutory Provisions Involved.

§1994, Revised Statutes of the United States, which was enacted on February 10, 1855 and was in effect until repealed on September 22, 1922, reads as follows:

> "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

The mother being qualified for citizenship and having married a citizen, under the provisions of law citizenship was thereby conferred upon her minor child. (*United States v. Kellar,* 13 Fed. 82 (C.C.A. Ill. 1882); *United States v. Rodgers,* 144 Fed. 711 (D.C. Pa. 1906)).

Title 8, U.S.C., §1302(a) provides as follows:

> "It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8, U.S.C., §1305 provides in part as follows:

> "Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of

each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General in writing of each change of address and new address within ten days from the date of such change. . . ."

Title 8, U.S.C., §1306 provides in part as follows:

"(a) Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

* * *

"(b) Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be taken into custody and deported in the manner provided by Part 5 of this subchapter, unless such alien es-

tablishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful."

The *Fifth Amendment* to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The *Sixth Amendment* to the Constitution of the United States provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The *Fourteenth Amendment* to the Constitution of the United States provides in part as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 16, Federal Rules of Criminal Procedure, provides in part as follows:

> "DISCOVERY AND INSPECTION
>
> *(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due dil-

igence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

"(b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order that attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

APPENDIX C.

Int. No. 56

Commonwealth of Massachusetts. Cert. No. 56

REGISTRY DEPARTMENT, CITY OF BOSTON.

Marriage License.

CERTIFICATE OF INTENTION OF MARRIAGE

be delivered to the Minister or Magistrate before whom the marriage is to be contracted, before he proceeds to marry the parties, and he must sign and return this paper to this office.

GROOM.		BRIDE.	
Liberato Francavilla	NAME	Maria A. Sacco	
Rear 27 Everett St. E. Boston	RESIDENCE	113 Haynes St. E. Boston	
58	AGE	38	
white	COLOR	white	
Storekeeper	OCCUPATION	At home	
Italy	BIRTHPLACE	Italy	
Luigi Francavilla	FATHER'S NAME	Giacomo Pasquale	
Italy	(BIRTHPLACE)	Italy	(BIRTHPLACE)
Carolina De Piano	MOTHER'S NAME	Caterina Graziano	
Italy	(BIRTHPLACE)	Italy	(BIRTHPLACE)
second	NO. OF MARRIAGE	second	
wid.	WIDOWED	wid.	WIDOWED
d.	DIVORCED	d.	DIVORCED

The above-named persons caused notice of their intention to be joined in marriage to be entered in this Registry thirty-first day of Jan., 1922, Issued FEB 6 1922

Attest: [signature] City Registrar.

THIS LICENSE IF NOT USED WITHIN SIX MONTHS FROM DATE OF ISSUE BECOMES INVALID AND MUST BE RETURNED TO THIS OFFICE.

Certificate of the Officiating Clergyman or Magistrate.

TO THE CITY REGISTRAR OF BOSTON, MASSACHUSETTS:

I hereby Certify, that I joined the above-named persons in marriage, at No. _____ St., (If marriage was solemnized in a church give its name instead of street and number)

Boston on the eighth day of February 1922

(City or Town.)

*Name, Salvatore Mattia

*Official Station, Justice of the Peace

Residence, St. and No. 125 Faywood Ave. East

FEB - 9 1922.

* Must be designated as "Minister of the Gospel," "Clergyman," "Priest," "Rabbi," or "Justice of the Peace."

NO ERASURE SHALL BE MADE ON THIS CERTIFICATE.—Revised Laws, Chap. 181, Sect. 1.

ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

FILIPPO SACCO a/k/a JOHN ROSSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

WILL WILSON,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 556

FILIPPO SACCO a/k/a JOHN ROSSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 428 F. 2d 264.

JURISDICTION

The judgment of the court of appeals was entered June 17, 1970. A petition for rehearing was denied July 21, 1970. The petition for a writ of certiorari

was filed August 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioner's conviction for failing to register as an alien.

2. Whether the evidence against petitioner was tainted by electronic eavesdropping.

STATEMENT

Petitioner was charged in the Central District of California with having failed to register as an alien from 1962-1967 and having failed to notify the Attorney General of his address. He was sentenced to imprisonment for six months on the first count and 30 days on the others, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

Petitioner's failure to register as an alien was undisputed at the trial. It was also uncontested that beginning in the 1920's he used the name John Rosselli and had on various occasions since 1940 claimed to have been born in Chicago in July 1904.[1] Petitioner does not, however, now deny that he is in fact Filippo Sacco, who was brought to the United States in 1911 from Naples, Italy, where he was born in 1905. (Pet. 2). Relying on the Act of February 10, 1855, 10 Stat. 604, Rev. Stat. 1944, repealed by Act of

[1] A register of births for Chicago for 1904 lists the birth of Giovanni Rosselli on July 4, 1904, and a register of births for 1905 lists a birth on June 4, 1905. A delayed birth report in 1936 contains an affidavit as to the reported birth on July 4, 1904.

September 22, 1922, 42 Stat. 1022, petitioner argued that he was in fact a citizen by virtue of his mother's marriage in February, 1922 (after his father's death) to a naturalized citizen named Ciancuilli.

The government's evidence showed that Ciancuilli was not able to contract a valid marriage with Maria Sacco in February 1922. In 1894 Ciancuilli married Liberata Dezueza in a church ceremony performed in Boston. Later, when the couple returned to Italy, the fact of the Boston marriage was recorded in Italy. Liberata bore Ciancuilli two sons, after which Ciancuilli left her (T. 1114-1115). He returned to the United States and lived with another woman, Carmina Tedesco, until her death in 1918 (T. 744). Ciancuilli went back to Italy in 1922 and remained there until his death in 1944. Liberata died in Italy in 1939, and her death certificate described Ciancuilli as her husband (T. 892-894, 1129). The evidence indicated that the marriage of Ciancuilli and Liberata was never terminated by annulment or divorce in Italy or in any of the Massachusetts counties where they had resided (T. 730-743, 745, 895-899, 1127-1128).

Petitioner's mother, Maria Sacco, a Massachusetts resident, was unable to travel to the trial. But the court admitted her signed statement as a declaration concerning family history and her deposition started by petitioner but not completed by cross-examination. According to Mrs. Sacco, she and Ciancuilli formed a common household for a short time and in 1920 a daughter was born.[2] (Tr. 1049-1051). In

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[2] The various records introduced at trial showed conflicting birth dates. A report of a birth, which was unattended,

1921 she and Ciancuilli obtained a marriage certificate from the Boston City Hall. Maria stated that "I believed we were then married like in the old country, Italy, and would then go to the church for the blessing * * * but some neighbors told me we were not legally married" (Tr. 936). The couple separated when she was told that Ciancuilli had a wife in Italy. After Ciancuilli admitted this, a ceremony before a justice of the peace took place on February 8, 1922. (Tr. 936-937). However, only a few weeks later Ciancuilli indicated in a passport application that he was sailing for Italy on April 22, 1922, and reported his residence as 151 Richmond Street, indicating that he was not living with Maria at the time (Tr. 745, 1127, 1182). Maria never heard from him again (Tr. 1057). In each year since the 1940 Alien Registration Act to the time of trial, Maria Sacco registered as a resident alien and never used the name Ciancuilli. (T. 334-335, 493-494, 1135-1136).[3]

The case was submitted to the jury with alternative instructions: in order to convict they would have to find that the government had shown (1) that at the time of the 1922 marriage, Ciancuilli had a living spouse and that such person's prior marriage had not been terminated by annulment or divorce, or (2)

---

showed the daughter to have been born in June 1921 while a baptismal certificate placed her birth in June 1922. School records gave her birth as August 1920, the year Mrs. Sacco also gave as the birth-date of this daughter by Ciancuilli (Tr. 1122-1124).

[3] Her daughter changed her name from Ciancuilli to Sacco in 1941 (Tr. 1059).

that the 1922 marriage ceremony was not entered into with the good faith intention to assume the relationship of husband and wife, but was entered into for a collateral purpose. Either finding would mean that neither Maria Sacco nor her then minor child, the petitioner, secured derivative citizenship (T. 1220-1220a).

ARGUMENT

1. Petitioner argues as if he had at all times claimed to be the child of Maria Sacco, truly believed that he had acquired derivative citizenship by Maria's marriage in 1922 and was suddenly confronted with a claim that the marriage was invalid. This is not the case. The government was not, as petitioner claims, belatedly attempting to set aside a claim of derivative citizenship which had been recognized for 46 years. Compare *Lim v. Mitchell*, No. 23,787, C.A. 9, decided August 21, 1970. It started out to show that petitioner's claims of United States birth as John Rosselli were false. When petitioner injected the issue of derivative citizenship in the case, the government properly showed that there had not been a valid marriage within the meaning of the Act of February 10, 1855, 10 Stat. 604, Rev. Stat. 1994, repealed by Act of September 22, 1922, 42 Stat. 1022. The jury agreed[1] and the evidence summarized in the

[1] We do not understand petitioner to attack the correctness of the jury instructions. Rather his position is that the jury should have been required to make special findings rather than return a general verdict. (Pet. 16-17, 28). *Bachellar v. Maryland*, 397 U.S. 564, the case relied upon for this proposition, fails to support it.

statement amply supports the conclusion that Maria's 1922 marriage was invalid and that she did regard it as such.[5]

2. Prior to the trial of this case, the government disclosed that there had been electronic surveillance of the petitioner (T. 1302), but, noting that the surveillance had in no way tainted this case, requested that for adequate reasons a hearing be postponed (see Pet. App. A 19-20; T. 21-25), until after trial. The court granted the request and denied defense motions for discovery and a pre-trial hearing relating to the electronic surveillance (T. 4-29). Following the verdict, a hearing was held on the issue of taint and on whether additional discovery should have been allowed to the defense. By stipulation evidentiary portions of a hearing on electronic surveillance in another related case in which the petitioner stands convicted were made part of the record (T. 1268-1270). Eleven volumes of logs of the surveillance were made available to the defense, the original tapes having been destroyed according to customary practice (T. 1257, 1271, 1273). The defense contended that it should have been allowed to discover the names of persons making, monitoring and removing the installations (T. 1271, 1274-1275). However, the court invited the defense to point out in the logs "a particular thing that might have some relevance" to the questions whether Sacco was a United States citizen

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[5] Petitioner's other claims with respect to 8 U.S.C. 1451, were adequately answered by the court of appeals (Pet. App. A, at 4-5).

and whether he filed the required reports (T. 1277).[6] Having received no response to its invitation the court properly determined that taint had not been shown (T. 1299-1303).

As the court of appeals noted, there is ample authority to support the view that such a post-trial hearing is a proper procedure (Pet. App. A 21). The contention that petitioner was not given all of the material from the surveillance involves nothing more than a claim that petitioner was not told the names of agents directly handling the electronic device. Their names were not relevant and therefore the trial court properly excised them from the logs before they were turned over to the defense (T. 1270-1271).

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[6] The court also permitted the defense to examine the agents involved in the related case, which involved a gambling investigation, in an effort to determine whether there was any connection between that investigation and the indictment in this case (T. 1278-1298).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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In the
Supreme Court of the United States

October Term 1970

No. 556

FILIPPO SACCO, also known as JOHN ROSSELLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now Filippo Sacco, also known as John Rosselli, and petitions for rehearing from the order of November 10, 1970 denying the petition for certiorari in the above entitled case.

The petition for rehearing is filed on the following grounds, to-wit:

1. The trial court at Los Angeles, and in the State of California and Central District, was without jurisdiction to try and hear the issue of the validity of the marriage of petitioner's mother and his naturalized stepfather. The validity of the marriage, if it could be tested at all after the death of his stepfather and his unavailability for trial, could only be in the State of Massachusetts where the marriage took place.

2. The validity of the marriage could not be tested colaterally in Los Angeles as there is a presumption that the marriage, duly performed in the State of Massachusetts prior to September 22, 1922, was valid and existing at all times subsequent thereto and that the son was a derivative citizen. Such presumption must be given full faith and credit under the Constitution and laws of the United States in a trial in California and cannot be invalidated by a collateral attack in California.

3. A document in a foreign country purporting to be a death certificate, and without any evidence as to how it was prepared or by whom and what the sources of the information contained therein were, cannot and does not overcome the regularity of a marriage performed in the United States and the presumption that the persons entering that marriage were free of crime or any violation of the law and that the child of one of the parties to the marriage derived derivative citizenship.

The issues are of great importance and have not been passed upon in any case heretofore before this Court.

This Court has never hesitated to re-examine its determinations when important phases of the case have been loverlooked.

This case is one of first impression and the only case we can find where a citizen has in effect been denaturalized and made an alien by a trial involving

his derivative citizenship from a marriage by his naturalized stepfather with his mother and where the trial is in another state from the place where the marriage took place.

Also, without an order and decision of the court of the state where the marriage took place.

Also, with a proceeding set up by Congress and the Immigration Department to attack citizenship. (Sec. 1451 (e), Title 8, U.S. Codes; Regulation 3851, Immigration Regulations)

The facts are simple and undisputed. Petitioner was the son of Maria De Pasquale Sacco Cianciulli.

His mother came to America with his father from Esperia, Italy, where he was born on July 4, 1905. His father, Vincenzo Sacco, died October 13, 1918 in Sommerville, Massachusetts. (R.T. 208-209) Maria, his mother, was a widow.

On February 8, 1922, and under the naturalization laws as they then existed, Maria married Liberato Cianciulli in Boston, Massachusetts. Cianciulli had been naturalized as an American citizen in Boston on September 20, 1909. (R.T. 212) Mrs. Cianciulli now became an American citizen by operation of law, as it then existed. (Act of February 10, 1855, 10 Stats. 604. Sec. 1994) Nothing was required under the Act to make the petitioner a derivative citizen. As such, he remained a derivative American citizen unless or until it could be taken away from him in the only way in

which Congress has authorized the taking away of American citizenship, to-wit, under the Naturalization Act of 1940, Title 8, Sec. 1451(a), U.S. Codes. This requires 60 days notice and a hearing, none of which was done.

Furthermore, the Act made no provision for the revocation of a derivative citizenship and Title 8, Sec. 1451(c) is retroactive, in effect quieting title to those who already have citizenship, by operation of law or otherwise. (*U.S. v. Keller*, 13 F. 82 (CCA III, 1882)

Therefore, neither Congress nor the Attorney General had any jurisdiction over him.

At no time was there ever any attempt to attack the validity of the marriage of Cianciulli and Mrs. Sacco in the state in which they were married during the lifetime of Cianciulli. No proceedings were taken anywhere until the petitioner was charged with being an alien who failed to register as an alien in these proceedings.

Petitioner produced uncontradicted evidence of the marriage of his mother to his naturalized stepfather, and although the government at this point conceded the marriage having taken place, the proof being positive beyond a reasonable doubt, they nevertheless sought to prove the marriage of the mother to the naturalized stepfather was invalid because of a claimed former wife of the stepfather.

To accomplish this attack, respondent sent an agent

to Italy to secure a death certificate of the alleged former wife of Mr. Cianciulli. There was objection to its use and its introduction on the ground that it was hearsay and no foundation was laid as to how the information on the document was secured and this document was offered to overcome the presumption of regularity of the American marriage in Boston of Mrs. Sacco to Cianciulli and the presumption that neither party was committing any crime and that there was no proof or any data as to any intervening years when the woman named in the death certificate had not been heard from by her son for a period of ten years or more.

In the *Estate of Shega,* 156 N.W. 2d 392, the court there held that conclusions in a foreign official document are not admissible. (20 Wisc. 2d 592)

In *In re Johnson's Estate,* 16 NYS 2d 855, 172 Misc. 1075, in proceedings for distribution of a portion of decedent's estate a certificate of a Swedish rector, who kept official vital statistics in Sweden, certifying in conformity with ministerial records and "with other documents," the nature of which was not revealed, regarding off-spring of marriage of deceased's alleged parents together with the date of their respective births and marriages, their off-spring and dates of their immigration to North America and the like, was inadmissible, since it was a "copy of a public foreign record" and was not "evidence" within the statute providing proof of foreign records. Civil Practice Act, §§329, 398.

In *In re Asterio's Estate*, 16 NYS 2d 943, 172 Misc. 1081, in proceedings by Public Administrator to pay distributable estate into a City Treasury for account of unknown distributees, alleged certificates executed in foreign country to effect that certain foreign subject was a brother of deceased were inadmissible where such certificates were not copies of records and merely certified officer's version of what the original record seemed to indicate. Civil Practice Act §§329, 398.

In *Russo v. Metropolitan Life Ins. Co.*, 3 Atl. 2d 844, an instrument reciting that official of Italian civil state "hereby certifies" that (named person) was born on (certain date), was not admissible in evidence as certified copy of record of such person's birth.

There were objections made that the information contained in the document herein which had been produced by the FBI agent consisted merely of conclusions and there was no showing who wrote the information contained in it. There is no presumption of the validity of the information contained in a foreign document and such document did not and could not overcome the presumption of the regularity and the marriage certificate acknowledged by the government in this case.

Congress has not authorized nor does the Constitution permit the taking away of a derivative citizenship any more than any other citizenship and only in the way provided by statute, if possible at all. See:

Title 8, Sec. 738(d), U.S. Codes; Title 8, Sec. 1451(e), U.S. Codes; Title 8; Sec. 906, U.S. Codes; and Title 8, Sec. 1101, note 1952, U.S. Codes.

There has never been a trial or confrontation of the petitioner of any live or percipient witnesses attacking the validity of the marriage of his mother to his stepfather and this is a deprivation of petitioner's Sixth Amendment rights.

The case is one of great importance in the administration of the naturalization laws of the United States and the protection of citizenship, whether original or derivative, and a hearing should be granted to determine these issues. (See: *Trop v. Dulles,* 356 US 86, 2 L.ed. 2d 650; U.S. Immigration Code, Title 8, and Rules and Regulations pursuant thereto; *U.S. v. Zucca,* 351 US 91, 100 L.ed. 964; *Costello v. U.S.,* 356 U.S., 256, 2 L.ed. 2d 711; 8 U.S.C.A. 1451(e); *Costello v. U.S.,* 365 US 265, 5 L.ed. 2d 571)

WHEREFORE, we respectfully pray that this Honorable Court grant a rehearing to determine the important issue of constitutional and statutory law in relation to immigration matters involved in this unusual case.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioner

CERTIFICATE OF COUNSEL

This petition is filed in good faith and not for the purpose of delay and the matter is one of first impression and importance and it is restricted to the grounds specified above.

MORRIS LAVINE